IN THE
UNITED STATES SUPREME COURT

NO. 79-892

JERRY DORMINEY

PETITIONER

VERSUS

UNITED STATES OF AMERICA

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO
THE FIFTH CIRCUIT COURT OF APPEALS

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JERRY DEAN DORMINEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, JERRY DEAN DORMINEY, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this case on September 24, 1979.

OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals is reported under the style of United States of America v. Robert L. Herring and Jerry Dean Dorminey, at 602 F2d 1220. A copy of the opinion is appended hereto.

JURISDICTION

The Petitioner appealed from the judgment of a conviction entered against him in the United States District Court for the Middle District of Georgia on charges of having violated 18 U.S.C. 2314, (interstate transportation of securities taken by fraud), and 18 U.S.C. 1962(c), (racketeering activity), and his appeal was denied by the Fifth Circuit Court of Appeals in an opinion dated September 24, 1979.

Petitioner's request for a rehearing was denied by an order dated October 31, 1979, which order was entered and made the judgment of the court on November 8, 1979, and this petition for certiorari was filed within thirty days from that date. This court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the impeachment of Petitioner by the use of testimony given by him under a grant of immunity in a bankruptcy proceeding can be harmless error, and if so, whether or not the Fifth Circuit Court of Appeals applied the proper standard in determining that such use of Petitioner's immunized bankruptcy testimony was harmless error.

2. Whether specific intent to defraud is a necessary element of the offense defined by 18 U.S.C. 2314, transporting a security (a check) in interstate commerce

knowing that the same had been taken by fraud.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES INVOLVED

United States Code, Title 11, section 25(a)(10):

> "The bankrupt shall ... at the first meeting of his creditors, at the hearing upon objections, if any, to his discharge and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge; but no testimony given by him shall be offered in evidence against him in any criminal proceeding, except such testimony as may be given by him in the hearing upon objections to his discharge..."

United States Code, Title 18, section 2314:

> "Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud...shall

be fined not more than $10,000 or imprisoned not more than ten years, or both."

(The entire text of this statute is attached hereto as a part of the appendix.)

United States Code, Title 18, section 1962(c):

> "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

United States Code, Title 18, section 1961:

> "As used in this chapter - (1) 'racketeering activity' means. . .(B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . sections 2314 and 2315 (relating to interstate transportation of stolen property)..."

United States Code, Title 18, section 1341:

This is the mail fraud statute. For complete text, see appendix.

STATEMENT OF THE CASE

The Petitioner was indicted along with Robert L. Herring and tried with him on a multi-count indictment. Herring was the head of Herco Corporation, a Georgia company involved in the sale of bulldozers and other heavy equipment. Petitioner was the head of Dean's Power Oil, Inc., a Georgia company involved in the retail sale of gasoline. Herring was charged with using Herco in a pattern of racketeering activity and Petitioner was charged with using Dean Oil in a pattern of racketeering activity. The pattern of racketeering activity was alleged to be a number of violations of

18 U.S.C. 2314. Each violation alleged involved a purported sale or lease of described equipment from Herco to Dean Oil. The sale or lease would provide that the purchase price would be paid over a stated period of time. Herco Corporation would then sell or assign contracts to various financial institutions. The money from the sale of this commercial paper came to Herco and most of it was then transferred by Herco to Dean Oil. The equipment that Herco purported to sell or lease to Dean Oil was never owned by Herco, and was never delivered to Dean Oil. After obtaining money from Herco, Dean Oil made payments on the installment contracts until it filed for an arrangement under Chapter XI of the Bankruptcy Act.

At the trial, each defendant blamed the other. Herring claimed that he thought Dorminey actually had possession

of the equipment, and was merely assisting him in obtaining loans using the equipment as collateral. Dorminey's defense was that he thought Herring had the equipment, and that the equipment was jointly owned by Dorminey, Herring, and a third person, and that these transactions were for the purpose of obtaining loans on the equipment in advance of, and in anticipation of, profits that were to be realized at a later time when the equipment was sold by Herring. The facts of the case were infinitely more complicated than the above summary, but in a nutshell, Dorminey's defense was a lack of specific intent to defraud.

On the trial, Defendant Dorminey explained two of the transactions he had entered into with Herring as being

motivated by his desire to help Herring pay C.I.T. Corporation monies owed on account of six contracts, not the subject of this indictment, or any other, which had been placed in evidence by Dorminey, and which were proven to have been contracts whereby Herring obtained over one million dollars through forgery of Dorminey's signature, which Dorminey did not find out about until C.I.T. began making efforts to collect from him. After giving this testimony, he was then impeached by cross-examination concerning testimony given by him at the first meeting of creditors of Dean Oil Chapter XI proceedings in which he had testified that these same two contracts had been entered into for the purpose of obtaining working capital for Dean Oil Company. All of this was done over vigorous objections of

Dorminey's counsel, who cited the pertinent immunity statute to the court. In addition, the trial court charged the jury that subsequent repayment by Dorminey of any monies obtained did not constitute a defense to the charge of having obtained money by fraud.

The Fifth Circuit Court of Appeals held that the impeachment of Dorminey by the use of bankruptcy testimony was error, but held it was harmless. With respect to Dorminey's contention concerning the trial court's charge, the Fifth Circuit held that the charge did not mislead the jury because the statute under which Dorminey was charged did not require specific intent to defraud, only "knowledge" that the money had been obtained by fraud.

REASONS FOR GRANTING THE WRIT

1. The decision of the Fifth Circuit Court of Appeals conflicts with decisions of other Courts of Appeals on the same issue.

The Petitioner never denied that he knew the transactions in question were not sales or leases, as they were purported to be. From the beginning, he stated that he never took delivery of the equipment and had never intended to. His only intention was to obtain loans, and Herco was providing this service for him. He believed that the equipment existed, that he owned interest in it, and he was using it for collateral. It developed that the financial institutions were hoodwinked on account of their policies of not inspecting collateral before purchasing commercial paper involving the sale or lease of equipment by the

equipment dealer. It was their practice to inspect equipment in cases where it was being offered as collateral for a straight loan. However, Petitioner did not know that. He was in the business of running gas stations; it was Herring who was in the equipment business.

Therefore, although Dorminey did not deny knowledge of the fact that documents purported to be sales and were not, his defense was that he did not know that the form of the documents made any difference, that he thought the collateral existed, that he thought the lenders would inspect the collateral, that he intended to repay, that he did repay until he was unable, and that he never had any intention to injure, damage or defraud any of the financial institutions.

The trial court took the position that Petitioner's defense was not a defense at all, and that the crime had been committed irregardless of his intention to repay, and irregardless of his intention to defraud, on account of the fact that he knew the sales contracts were not true sales at the time he signed them. Consequently, the trial court charged the jury that repayment was not a defense, but failed to charge the jury that the jury could consider repayment as it may reflect upon defendant's intent to defraud. Petitioner took timely exception to this portion of the trial court's charge and presented the matter to the Fifth Circuit Court of Appeals. The Fifth Circuit said:

> "While admitting that this charge is technically correct, he claims that such a charge misled the jury by preventing it from considering repayment as a factor bearing on his intent concerning the contracts in question. We cannot say that the jury was misled by the trial court's instruction. The statute under which both defendants were convicted requires only 'knowledge' that the checks transported in interstate commerce had been obtained by fraud, not any specific intent to defraud."

The Fifth Circuit's ruling holds, in effect, that specific intent to defraud is not an element of the crime, 18 U.S.C. 2314. In so doing, the Fifth Circuit has made it easier for the government to prove criminal fraud than it is for civil litigants to prove civil fraud. They have eliminated the requirement of scienter. There is no case in any other circuit specifically holding that the language in 18 U.S.C. 2314, "knowing the same to have been stolen, converted or taken by fraud..." requires proof of specific intent to defraud. The lack of such cases is probably due to the fact that the answer

to the question is so obvious. However, the question has been decided in the context of the mail fraud statute, 18 U.S.C. 1341. United States v. Regent Office Supply Company, 421 F2d 1174 (2nd Cir., 1970) involved a case where lies and misrepresentations were made to prospective customers in order to obtain their business. The misrepresentations, however, did not have anything to do with the quality or price of merchandise. This Court of Appeals held that although it was not essential for the government to allege or prove that the victims were in fact defrauded, it was necessary for the government to show, "that some actual harm or injury was contemplated . . . Proof that someone was actually defrauded was unnecessary because the critical element in a 'scheme to defraud'

is 'fraudulent intent'. . . the purpose of the scheme 'must be to injure, which doubtless may be inferred when the scheme has such effect as a necessary result of carrying it out'." United States v. Regent Office Supply, supra, at 1180, 1181. The court went on to hold that although the evidence showed intent to deceive, and an intent to induce the other party to enter into the bargain through the use of deception, this, without more, did not constitute fraudulent intent necessary to convict for a crime. Under the mail fraud statute, the court said, "if there is no proof that defendants expected to get 'something for nothing', [citation omitted] or that they intended to get more for their merchandise than it was worth to the average customer, it is difficult to see any intent to injure or to defraud in the defendants' false-

hoods, United States v. Regent Office Supply Company, supra, at 1181.

The Fifth Circuit's opinion in this case is in direct conflict with the Regent Office Supply case in that the Fifth Circuit has held that intent to injure, intent to get "something for nothing", and intent to defraud are not elements of the crime for which Petitioner was convicted.

2. The decision of the Fifth Circuit Court of Appeals decided an important question of federal law not previously decided by this court, which should be settled by this court, and the decision of the Fifth Circuit Court of Appeals conflicts with certain dicta of this court.

This court, in the case of New Jersey v. Portash, 59 L.Ed.2d 501 (1979), held that testimony given in

response to a grant of legislative immunity could not be used to impeach a defendant in a later criminal trial. In the course of that opinion, this court observed, "testimony given in response to legislative immunity is the essence of coerced testimony." 59 L.Ed.2d 501, at 510. The Fifth Circuit agreed with Petitioner that the impeachment use of his bankruptcy testimony was error, but held the error to be harmless beyond a reasonable doubt, largely upon the basis that Dorminey had admitted that he never had any intention to possess the heavy equipment purportedly leased or sold to him. The Fifth Circuit failed to apply the proper standard in determining whether or not the error was harmless.

In Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967), the Supreme Court discussed the standards that should be applied in cases of constitutional error. The Court reiterated what it had previously said in the case of Fahy v. Connecticut, 375 U.S. 85, 11 L.Ed.2d 171, 84 S.Ct. 229, to wit:

> "The question is whether there is a possibility that the evidence complained of might have contributed to the conviction...although our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error, this statement in Fahy itself belies any belief that all trial errors which violate the Constitution automatically call for reversal. At the same time, however, like the federal harmless-error statute, it emphasizes an intention not to treat as harmless those constitutional errors that 'affect substantial rights' of a party. An error in admitting plainly relevant evidence

> which possibly influenced the jury adversely to a litigant cannot, under Fahy, be conceived of as harmless."

386 U.S. 18 at 23,24; 17 L.Ed.2d 705 at 710. The court went on to hold that it must be shown, "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. 18 at 24; 17 L.Ed.2d 705 at 710.

A footnote appears immediately following the language in Chapman which says that, "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. . ." This footnote cites three cases as examples of constitutional rights whose infraction can never be treated as harmless error. The list is apparently not intended to be exhaustive and includes the cases of Payne v. Arkansas, 356 U.S. 560, 2 L.Ed.2d 975,

78 S.Ct. 844, a case of a coerced confession; Gideon v. Wainwright, 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792, a case involving the right to appointed counsel, and Tumey v. Ohio, 273 U.S. 510, 71 L.Ed. 749, 47 S.Ct. 437, a case involving the right to a fair and impartial judge. The Fifth Amendment privilege against self-incrimination is a very basic constitutional right, and this court has gone to great lengths to see that this basic right is protected. In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), in order to protect a suspect's Fifth Amendment rights, the police were required to advise suspects of their right to remain silent. Certainly the use of immunized bankruptcy testimony to impeach a defendant in a criminal trial involves a right so basic to a

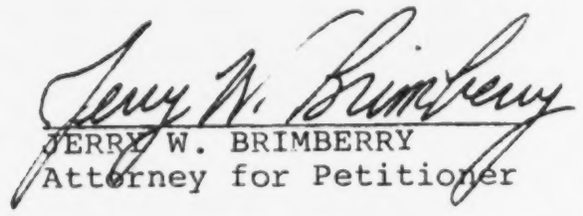
fair trial that it can never be harmless error.

Even if it is proper to apply the harmless error doctrine to improper impeachment use of immunized testimony, it was error for the Fifth Circuit to find it to be harmless under the circumstances of this case. Petitioner's credibility was an important factor in his defense, as it is in every criminal case. It would be a rare case where successful impeachment of a criminal defendant could not be said to have had an effect upon the outcome of the case.

CONCLUSION

A writ of certiorari ought to issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,



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UNITED STATES of America, Plaintiff-Appellee,

v.

Robert L. HERRING, and Jerry D. Dorminey, Defendants-Appellants.

No. 78-5654.

United States Court of Appeals, Fifth Circuit.

Sept. 24, 1979.

Defendants were convicted in the United States District Court for the Middle District of Georgia, at Albany, Wilber D. Owens, Jr., J., of racketeering activity affecting interstate commerce and of interstate transportation of securities procured by fraud, and they appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) reference to interstate transportation of stolen property in parenthetical following citation of section 2314 in statutory definition of racketeering activity was intended merely to aid the identification of section 2314 rather than to limit the proscription of the racketeering statute, and thus interstate transportation of securities converted or taken by fraud could properly be basis for charge of violation of the racketeering statute; (2) indictments were sufficient; (3) one defendant failed to carry burden of proving that his retained counsel was ineffective despite denial of motion for continuance alleging that counsel had not had sufficient access to defendant to prepare a defense; (4) trial court did not abuse its discretion in denying severance despite claim of one defendant that he was denied right to fair trial because of trial atmosphere in which each defendant attempted to place the blame on the other; (5) in prosecution in which one defendant asserted as his defense that he had been drawn into the transactions by codefendant, codefendant's cross-examination of defendant concerning similar, but not charged, fictitious installment sale contracts to show defendant's knowledge or intent concerning the crimes charged was proper; and (6) allowing impeachment of defendant through statements made at first meeting of creditors in bankruptcy proceeding was improper, but error was harmless in light of defendant's admissions and other evidence providing overwhelming evidence to implicate defendant in the charged crimes.

Affirmed.

1. Receiving Stolen Goods ⇐1

Reference to interstate transportation of stolen property in parenthetical following citation of section 2314 in statutory definition of racketeering activity was intended merely to aid the identification of section 2314 rather than to limit the proscription of the racketeering statute, and thus interstate transportation of securities converted or taken by fraud could properly be basis for charge of violation of the racketeering statute. 18 U.S.C.A. §§ 1961, 1962(c), 2314.

2. Receiving Stolen Goods ⇐7(2)

Indictment alleging interstate transportation of securities procured by fraud was not fatally defective for lack of words knowingly, wilfully, or unlawfully, as allegation that defendant knew that the checks had been taken by fraud was sufficient to charge the crime. 18 U.S.C.A. § 2314.

3. Commerce ⇐82.5
Receiving Stolen Goods ⇐7(1)

Indictment charging racketeering activity affecting interstate commerce and interstate transportation of securities procured by fraud was sufficient where it sufficiently specified the transactions out of which the charges arose and traced the language of the statutes allegedly violated. 18 U.S.C.A. §§ 2, 1962(c), 2314.

4. Criminal Law ⇐1035(7)

Question with respect to adequacy of counsel, based on information furnished after oral argument and relating to events occurring after trial, was not properly before Court of Appeals on appeal from convictions.

5. Criminal Law ⇐1141(2)

Defendant failed to carry burden of proving that retained counsel was ineffective, despite trial court's failure to grant motion for continuance filed four days prior to trial in which counsel stated that he had not had sufficient access to defendant to prepare a defense.

6. Criminal Law ⇐622(1), 1152(1)

Defendants charged in the same indictment for their participation in the same crimes may be tried together; it is only when the trial court determines that a party is prejudiced that a severance should be granted, and trial court's decision to deny motion for severance will not be disturbed unless a defendant can bear a heavy burden of showing prejudice. Fed.Rules Crim.Proc. rules 13, 14, 18 U.S.C.A.

7. Criminal Law ⇐622(2)

Trial court did not abuse its discretion in denying severance, despite contention by one defendant that he was denied right to fair trial because of trial atmosphere in which each defendant attempted to place the blame on the other, where both defendants were involved in transactions charged in the indictment and severance would have resulted in duplicitous presentation of basically the same evidence. Fed.Rules Crim.Proc. rules 13, 14, 18 U.S.C.A.

8. Criminal Law ⇐622(2)

Attempt by codefendants to rely on conflicting defenses alone is not sufficient to meet showing of prejudice required for severance; complaining defendant must at least demonstrate that the conflict is so irreconcilable that the jury will infer that both defendants are guilty solely due to the conflict. Fed. Rules Crim.Proc. rules 13, 14, 18 U.S.C.A.

9. Witnesses ⇐277(2)

In prosecution in which one defendant asserted as his defense that he had been drawn into the transactions by codefendant, codefendant's cross-examination of defendant concerning similar, but not charged, fictitious installment sale contracts to show defendant's knowledge or intent concerning the crimes charged was proper. Fed.Rules Evid. rule 404(b), 28 U.S.C.A.

10. Witnesses ⇐345(1)

Trial court sufficiently complied with rule with respect to determining whether the probative value of evidence of prior convictions outweighs its prejudicial effect, so as to render the prior convictions admissible for impeachment purposes. Fed.Rules Evid. rules 609(a)(1), (b).

11. Witnesses ⇐269(1)

Trial court normally is to limit cross-examination to matters covered on direct examination, though it is within the judge's discretion to allow a more open cross-examination. Fed.Rules Evid. rule 611(b).

12. Witnesses ⇐246(2)

It is within the discretion of trial court to call witnesses. Fed.Rules Evid. rule 614(a).

13. Witnesses ⇐270(1), 246(2)

Considering collateral nature of testimony defendant sought to elicit, trial court did not abuse its discretion in limiting cross-examination of a witness or in refusing to call another person as its own witness, in support of defendant's claim that codefendant had mislead him in fraudulent transactions. Fed.Rules Evid. rules 611(b), 614(a), 28 U.S.C.A.

14. Criminal Law ⇐1170½(1)
Witnesses ⇐380(2)

Allowing impeachment of defendant through statements made at first meeting of creditors in bankruptcy proceeding was improper, but error was harmless in light of defendant's admissions and other evidence providing overwhelming evidence to implicate defendant in the charged crimes. Bankr.Act, § 7, sub a(10), 11 U.S.C.A. § 25(a)(10).

15. Criminal Law ⇐42

Where testimony has been compelled under the protection of immunity, such testimony should not even be used for impeachment purposes.

16. Criminal Law ⇐1038.1(2)

Absent timely objection to court's instructions, and absent plain error, defendant was precluded from asserting challenge on appeal. Fed.Rules Crim. Proc. rule 30, 18 U.S.C.A.

17. Fraud ⇐69(7)

Instruction that subsequent repayment of funds obtained by fraud is not a legal defense to charge of fraud did not mislead jury on a theory that it prevented it from considering repayment as a factor bearing on defendant's intent concerning contracts giving rise to the charges in question.

Appeals from the United States District Court for the Middle District of Georgia.

Before SIMPSON, TJOFLAT and HILL, Circuit Judges.

TJOFLAT, Circuit Judge:

Robert L. Herring and Jerry D. Dorminey appeal their convictions for racketeering activity affecting interstate commerce, 18 U.S.C. § 1962(c) (1976),[1] and for interstate transportation of securities procured by fraud, 18 U.S.C. §§ 2, 2314 (1976)[2]. They contend that the tri-

1. 18 U.S.C. § 1962(c) provides:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt

2. 18 U.S.C. § 2314 provides in part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; [shall be fined and or imprisoned]

The term "securities" is defined in 18 U.S.C. § 2311 (1976) to include checks

al court erred in evidentiary rulings and its charge to the jury; Herring also challenges the sufficiency of the indictment, the refusal of the court to sever his case from Dorminey's and the quality of his legal representation. After reviewing each of their claims of error, we affirm both convictions.

I

The salient facts in this case embroil the appellants and their companies in a scheme of financing fraud. Herring was the head of Herco Corporation (Herco), a Georgia corporation involved in heavy equipment sales. Dorminey was the head of Dean's Power Oil, Inc. (Dean's Oil), a Georgia corporation involved in the retail sale of gasoline. As part of his business, Herring would obtain financing for heavy equipment sales. This ordinarily involved the sale of the equipment under an installment sale contract, which Herco would discount with a financing company in order to receive directly large sums of money. Herring and Dorminey fraudulently obtained in excess of $1,200,000 from five different financial institutions, supposedly to finance the sale of heavy equipment by Herco to either Dean's Oil, Dorminey personally, or another party.

The heavy equipment that was the subject of these "sales" and that supposedly secured the financing was in fact owned by others in various places from Puerto Rico to Algeria and in one instance was non-existent. Representatives from the financial institutions testified that only because these transactions had been structured as "sales" did the financial institutions not require an independent inspection of the equipment; had they been cast as "loans," an inspection of the collateral would have revealed the absence of the equipment and resulted in no money for Herring and Dorminey. The funds obtained in this manner from the financiers were divided between Herring and Dorminey; Dean's Oil then made payments on the installment sales contracts, at times with funds supplied by Herco.

Herco eventually went into bankruptcy and Dean's Oil filed for a Chapter XI arrangement. At the trial, each defendant attempted to place the blame on the other. Herring, attempting to negate any intent to defraud, contended that he was merely assisting Dorminey, as a favor, to obtain loans on equipment he believed Dorminey owned. Dorminey also denied any intent to defraud; he testified that Herring had told him that Herco owned the equipment serving as the security for the loans and that the transactions were legitimate. The jury was not persuaded by their inculpative defenses and found defendant Herring guilty of seven counts and Dorminey guilty of six counts of interstate transportation of securities procured by fraud under 18 U.S.C. § 2314 and each guilty of one count of racketeering activity under 18 U.S.C. § 1962(c).

II

On appeal, Herring and Dorminey each challenge the fairness of his trial. We turn to the points of error each has raised.

A. *Sufficiency of the Indictment*

Herring contends that the indictment improperly charged a violation in the count brought under 18 U.S.C. § 1962(c) and failed to allege the essential elements of a crime in any of the 18 U.S.C. § 2314 counts. Section 1962(c) makes illegal interstate activities that are conducted through a pattern of racketeering activity. "Racketeering activity" is defined in section 1961 to include violations of certain sections of Title 18 of the United States Code, among them section 2314.[3] In listing these code sections, section 1961 provides an explanatory parenthetical for the type of crime incorporated into the definition of racketeering activity. Drawing on the explanatory parenthetical following the listing of section 2314, Herring contends the indictment does not charge a violation of 18 U.S.C. § 1962(c).

[1] The explanatory parenthetical for section 2314 states "(relating to interstate transportation of stolen property)." See note 3 *supra*. In this case, however, the section 2314 conduct that allegedly constituted a section 1962(c) pattern of racketeering was not described as interstate transportation of *stolen* property; rather, the conduct pertained only to securities *converted or taken by fraud*. The explanatory parenthetical, Herring argues, limits the kind of section 2314 conduct that constitute a pattern of racketeering activity for section 1962(c) purposes to interstate transportation of *stolen* property. The interstate transportation of securities *converted or taken by fraud*, as charged in this case, is not included; therefore, Herring submits, the section 1962(c) count fails to allege an offense.

The Organized Crime Control Act of 1970, Pub.L. 91-452, 84 Stat. 922, was enacted to further the eradication of organized crime. *Id.* §§ 1, 904. Such a restrictive reading of the statute as that suggested by Herring would undermine the remedial purposes that Congress intended. If Congress had intended to exclude the interstate transportation of property obtained by fraud from its definition in section 1961, it specifically could have limited the incorporation of section 2314 as it did the incorporation of section 659, where only felonious acts under section 659 are included. See note 3 *supra*. We hold that the reference to the interstate transportation of stolen property in the parenthetical following the citation of section 2314 in the section 1961 definition of racketeering activity was intended merely to aid the identification of section 2314 rather than to limit the proscriptions of that section. Because of this, the indictment properly charged a crime under 18 U.S.C. § 1962(c).

[2, 3] Herring attacks the counts of the indictment based on section 2314 by claiming that they fail to allege the essential elements of a crime. He contends that the lack of the words knowingly, willfully, or unlawfully is a fatal infirmity. We cannot agree. In addressing the requirements of the same part of section 2314 involved here, this court has stated: "To sustain a conviction under this statute it is necessary to prove that the accused transported the goods in interstate or foreign commerce, that the value of the goods so transported was $5,000 or more and that he knew they had either been stolen, converted or

3. 18 U.S.C. § 1961 (1976) provides in part:
As used in this chapter—
(1) "Racketeering activity" means
(B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, sections 2314 and 2315 (relating to interstate transportation of stolen property).

taken by fraud." *Johnson v. United States*, 207 F.2d 314, 319 (5th Cir. 1953), *cert. denied*, 347 U.S. 938, 74 S.Ct. 632, 98 L.Ed. 1087 (1954). *See United States v. Franklin*, 586 F.2d 560, 564 (5th Cir. 1978), *cert. denied*, — U.S. — , 99 S.Ct. 1536, 59 L.Ed.2d 789 (1979). Each count of the indictment in this case alleges that the defendants knew that the checks had been taken by fraud and is sufficient to charge a crime. The authorities cited by Herring are not apposite since they deal with the requirements of different statutes or different subsections of section 2314. Similarly, we cannot accept Herring's contention that the indictment failed to inform him of the nature of the charges against him. Here the indictment sufficiently specified the transactions out of which the charges arose and traced the language of the statutes allegedly violated. *See Grene v. United States*, 360 F.2d 585, 586 (5th Cir.) (per curiam), *cert. denied*, 385 U.S. 978, 87 S.Ct. 522, 17 L.Ed.2d 440 (1966).

B. *Adequacy of Legal Representation*

[4, 5] Herring next contends that he was not adequately represented by his retained counsel at trial and thus was denied his right to effective assistance of counsel.[4] The basis for this claim stems from the trial court's failure to grant Herring's motion for continuance filed four days prior to trial, in which his counsel stated that he had not had sufficient access to Herring to prepare a defense and thus was unable to provide him effective representation. Herring, however, has not specified one instance at trial where he was not adequately represented. Moreover, the record indicates that Herring's counsel filed numerous pretrial motions and was successful in obtaining a change of venue. The record also reveals that counsel was familiar with the dealings of Herring and Herco, having represented them in business affairs, in Herco's voluntary petition for bankruptcy, and in other civil and criminal actions arising out of the transactions involved in this prosecution. 1st Supp. Record, vol. 4, at 11 17. Herring simply has not carried his burden of proving that his retained counsel was ineffective. *See Marino v. United States*, 600 F.2d 462, 464 (5th Cir. 1979), (per curiam).

C. *Joint Trial of the Codefendants*

[6–8] The trial court did not grant Herring's motion to sever his trial from that of Dorminey, although it did sever one count of the indictment pertaining to bribery.[5] Herring now claims that he was denied his right to a fair trial because of the trial atmosphere in which each defendant attempted to place the blame on the other. Defendants charged in the same indictment for their participation in the same crimes may be tried

4. After oral argument, Herring informed the court that his retained trial counsel had been indicted along with Herring and others for bankruptcy fraud and alleged that a conflict of interest prevented adequate representation, even though the indictment for bankruptcy fraud was not returned until eight months after the indictment and five months after trial in this case. This question is not properly before this court in this appeal, and we decline to consider it. *See United States v. Prince*, 456 F.2d 1070 (5th Cir. 1972) (per curiam)

5. Defendants Dorminey and Carlton Dixon, an employee of Dean's Oil who was indicted also, were successful in their motion to sever for separate trial a count charging them with bribery of an Internal Revenue Service Agent who was attempting to determine the amount of federal excise taxes owed by Dean's Oil. 1st Supp. Record, vol. 2, at 87.

together; it is only when the trial court determines that a party is prejudiced that a severance should be granted. Fed.R.Crim.P. 13, 14. The trial court's decision to deny a motion for severance will not be disturbed unless a defendant can bear "a heavy burden" of showing prejudice. *United States v. Crockett*, 514 F.2d 64, 70 (5th Cir. 1975). Here the trial court did not abuse its discretion. Because both defendants were involved in the transactions charged in the indictment, a severance would have resulted in the duplicitous presentation of basically the same evidence. The attempt by codefendants to rely on conflicting defenses alone is not sufficient to meet the showing of prejudice; the complaining defendant must at least demonstrate that the conflict is so irreconcilable that the jury will infer that both defendants are guilty solely due to the conflict. *United States v. Martinez*, 466 F.2d 679, 687 (5th Cir. 1972), *cert. denied*, 414 U.S. 1065, 94 S.Ct. 571, 38 L.Ed.2d 469 (1973). Herring has not met this burden.

D. *Evidentiary Rulings by the Trial Court*

[9] Both Herring and Dorminey claim that the trial court erred in either admitting or excluding certain testimony, much of which was offered by one against the other. One point of alleged error concerns the admission of evidence about similar illicit financial transactions. Over Herring's objection, counsel for Dorminey questioned Herring on cross-examination about installment sale contracts on which Dorminey's name had been forged as purchaser, although they were not the subject of the indictment. Dorminey then proceeded to prove these fictitious installment sales in his case-in-chief. Herring argues that the admission of this evidence denied his right to a fair trial because it was not relevant and had the effect of proving the crimes that the indictment did charge. This argument fails to recognize that evidence of other crimes or acts may be admissible for the purpose of showing intent, plan, or knowledge under Fed.R.Evid. 404(b).[6] The trial court determined that this evidence was relevant before admitting it with a limiting instruction to the jury. 1st Supp. Record, vol. 9, at 647, 788; *id.*, vol. 11, at 1223 24. This limited use of testimony about the similar fictitious installment sale contracts to show Herring's knowledge or intent concerning the crimes charged, especially in light of his defense that he had been drawn into these transactions by Dorminey, was proper. *See United States v. Bryant*, 490 F.2d 1372, 1377 (5th Cir.), *cert. denied*, 419 U.S. 832, 95 S.Ct. 57, 42 L.Ed.2d 58 (1974).

[10] The trial court also permitted Herring to be impeached by two prior felony convictions for stealing farm tractors.[7] Herring alleges, however, that the court failed to follow the requirements

6. Fed.R.Evid. 404(b) provides

> *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

7. Herring also makes reference in his brief to the admission of a prior conviction for manufacturing non-tax paid liquor. Brief for Appellant Herring at 48 n. 21, 50. We have been unable to find any reference to such a conviction at the trial.

of Fed.R.Evid. 609[8] by not properly weighing the probative value against the prejudicial effect of the convictions. The record fails to support this contention. One of the felony convictions was in 1969, the other in 1970. Since the trial occurred during 1978, neither was excluded by the ten-year limitation of rule 609(b). After examining the conviction documents and discussing the matter with the attorneys in a bench conference, the trial court made a specific finding that the probative value of the convictions substantially outweighed their prejudicial effect and that the convictions were admissible for impeachment purposes. 1st Supp. Record, vol. 8, at 538–39. This was sufficient to meet the rule 609(a)(1) requirements of admissibility.[9] *United States v. Wiggins*, 566 F.2d 944, 946 (5th Cir.) (per curiam), *cert. denied*, 436 U.S. 950, 98 S.Ct. 2859, 56 L.Ed.2d 793 (1978). The trial court also correctly instructed the jury on the limited use of the convictions. 1st Supp. Record, vol. 8, at 544.

Dorminey claims that the trial court committed reversible error by not allowing him to cross-examine Ed Miller, a prosecution witness from one of the finance companies, about a Rick Bartholomew and by refusing to call Bartholomew as a court witness. Bartholomew was employed by the same finance company as Miller, and Dorminey wished to elicit testimony supposedly to prove a conspiracy between Bartholomew and Herring concerning the same allegedly forged contracts that Dorminey had used to impeach Herring. Dorminey wished to use this testimony to show a general pattern of deceit in Herring's business dealings and thus support his claim that Herring had misled him. Miller had testified on direct examination that Dorminey, when initially questioned about the allegedly forged contracts, had not denied involvement. 1st Supp. Record, vol. 10, at 1038. When Dorminey's counsel sought to question Miller about Bartholomew, the prosecutor objected that the inquiry was beyond the scope of direct examination and was sustained. Later, prior to the commencement of Dorminey's defense, the court was requested to call Bartholomew as its witness to allow Dorminey, in a cross-examination posture,[10] to prove that Bartholomew and

8. Fed.R.Evid. 609 provides in part:

> (a) *General rule.*—For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.
>
> (b) *Time limit.*—Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

9. Because we hold that the requirements of rule 609(a)(1) were met, we express no opinion as to whether the prior crimes would be automatically admissible under rule 609(a)(2). *Cf. United States v. Carden*, 529 F.2d 443, 446 (5th Cir.), *cert. denied*, 429 U.S. 848, 97 S.Ct. 134, 50 L.Ed.2d 121 (1976) (petty larceny conviction involved dishonesty and was admissible for impeachment).

10. Dorminey did not call Bartholomew as his own witness, nor did he make any showing that Bartholomew was a hostile witness who could not be examined adequately without resort to leading questions. Because we find that the trial judge acted well within his discretion in restricting Dorminey's cross-examination of Miller and refusing to call Bartholomew as a court's witness, we need not decide whether Dorminey waived his right, under the circumstances present, to claim error.

Herring had arranged the contracts without Dorminey's knowledge. The court refused to call Bartholomew, viewing Dorminey's strategy as an attempt to develop a mere "side issue on intent" that did not concern the contracts charged in the indictment. 1st Supp. Record, vol. 10, at 1107.

[11–13] Under Fed.R.Evid. 611(b)[11], the trial court normally is to limit cross-examination to matters covered on direct examination, although it is within the judge's discretion to allow a more open cross-examination. *See United States v. Rice*, 550 F.2d 1364, 1371 (5th Cir.), *cert. denied*, 434 U.S. 954, 98 S.Ct. 479, 54 L.Ed.2d 312 (1977). Similarly, it is within his discretion to call witnesses. *See Steinberg v. United States*, 162 F.2d 120, 124 (5th Cir.), *cert. denied*, 332 U.S. 808, 68 S.Ct. 108, 92 L.Ed. 386 (1947); Fed.R.Evid. 614(a).[12] Considering the collateral nature of the testimony that Dorminey sought to elicit, the trial court did not abuse its discretion in limiting the cross-examination of the witness from the finance company or in refusing to call Bartholomew as its own witness.

[14, 15] Dorminey further argues that the trial court committed reversible error by allowing Herring to impeach him through statements he made at the first meeting of the creditors in Dean's Oil's Chapter XI proceedings in violation of the immunity mandated by 11 U.S.C. § 25(a)(10) (1976).[13] At trial, Dorminey testified that he had entered into two of the transactions in the indictment to assist Herring in paying off the contracts on which Dorminey's name had been forged as purchaser. Herring then sought to impeach Dorminey with his prior bankruptcy testimony in which Dorminey had said that he had entered into the two transactions to obtain working capital for Dean's Oil. 1st Supp. Record, vol. 10, at 964–67. After the court asked for the applicable law in the area and none of the parties enlightened it, it allowed the impeachment to proceed over Dorminey's objection. *Id.* at 978–80. The use of this prior bankruptcy testimony was improper.

Section 25(a)(10) compelled Dorminey to testify in the bankruptcy proceedings

11. Fed. Rule Evid. 611(b) provides:

> *Scope of cross-examination.*—Cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

12. Fed.R.Evid. 614(a) provides:

> *Calling by court.*—The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

13. 11 U.S.C. § 25(a)(10) provides:

> [A]t the first meeting of his creditors, at the hearing upon objections, if any, to his discharge and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge; but no testimony, or any evidence which is directly or indirectly derived from such testimony, given by him shall be offered in evidence against him in any criminal proceeding, except such testimony as may be given by him in the hearing upon objections to his discharge.

11 U.S.C. § 702 (1976) makes § 25(a)(10) applicable to Chapter XI proceedings to the extent not inconsistent with the provisions of Chapter XI.

concerning his financial matters, but provided that the testimony so given could not be offered in evidence against him in any criminal proceeding. See note 13 *supra*. Where testimony has been compelled under the protection of immunity, such testimony should not even be used for impeachment purposes. *See United States v. Moss*, 562 F.2d 155, 163 (2d Cir.1977), *cert. denied*, 435 U.S. 914, 98 S.Ct. 1467, 55 L.Ed.2d 505 (1978). The only recognized exceptions to this rule involve prosecutions for the commission of perjury at the first meeting of the creditors or for contempt for refusing to testify. These exceptions are necessary to prove the perjury or contempt and to discourage the same; they are inapplicable here. See 1A Collier on Bankruptcy ¶ 7.21, at 1022-23 (14th ed. J. Moore & L. King 1978).

Here, however, we find the error harmless. Dorminey admitted signing the documents (in which he or Dean's Oil was identified as the purchaser or lessee) necessary to procure the funds from the financing companies, even though he admittedly had no use for and no intention to possess the heavy equipment purportedly sold or leased to him. These documents included statements that the purchaser or lessee acknowledged receipt or possession of the covered machinery. Dorminey also admitted that he believed the financier would rely on these documents in deciding whether to provide funds that Dorminey, as *lessee* or *purchaser*, wanted to obtain. 1st Supp. Record, vol. 10, at 906, 932 36.[14] These funds normally would go to pay the *seller* of the machinery. Additional witnesses and evidence other than the wrongfully admitted bankruptcy testimony cast sufficient doubt on Dorminey's credibility to impeach him. The jury had overwhelming evidence to implicate Dorminey in the charged crimes, and we therefore hold that the error in admitting the bankruptcy testimony was harmless beyond a reasonable doubt. *See Harrington v. California*, 395 U.S. 250, 254, 89 S.Ct. 1726, 1728, 23 L.Ed.2d 284 (1969).

E. *The Trial Court's Instructions to the Jury*

[16, 17] Herring and Dorminey both challenge portions of the trial court's charge to the jury. Counsel for Herring, however, failed to make a timely objection to the court's instructions. Herring is thus precluded from asserting his challenge on appeal under Fed.R.Crim.P. 30[15] unless we find plain error. After reviewing his contentions, we find no such error. Dorminey challenges the

14. Dorminey contends that he did not read the contracts and that he did not know why the finance companies would lend the money without inspecting the machinery used as collateral. We, like the jury, find this difficult to believe. Dorminey was the majority shareholder of a bank at the time of these transactions and admitted that his bank would not advance such large amounts of money without a physical inspection. 1st Supp. Record, vol. 10, at 930-31.

15. Fed.R.Crim.P. 30 provides in part:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

section of the court's charge stating that the subsequent repayment of funds obtained by fraud is not a legal defense to the charge of fraud. While admitting that this charge is technically correct, he claims that such a charge misled the jury by preventing it from considering repayment as a factor bearing on his intent concerning the contracts in question. We cannot say that the jury was misled by the trial court's instruction. The statute under which both defendants were convicted requires only "knowledge" that the checks transported in interstate commerce had been obtained by fraud, not any specific intent to defraud. Here ample evidence allowed the jury to find that the requisite knowledge was present.

Accordingly, we uphold the jury verdicts and the judgments of conviction.

AFFIRMED.

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United States Code, Title 18, section 2314:

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof -

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

United States Code, Title 18, section 1341:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such

matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

CERTIFICATE OF SERVICE

GEORGIA, DOUGHERTY COUNTY:

This is to certify that I have this day mailed a copy of the foregoing Petition for Writ of Certiorari to the Honorable Denver L. Rampey, Jr., United States Attorney, and to Mr. Samuel A. Wilson, Assistant United States Attorney, by depositing the same in the United States mail addressed to them at Post Office Box "U", Macon, Georgia, 31202, with adequate postage fully prepaid thereon.

This 7th day of December, 1979.

Jerry W. Brimberry

JERRY W. BRIMBERRY,
Attorney for Petitioner